[redacted]

# United States Supreme Court

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OCTOBER TERM, 1919.

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UNION PACIFIC RAILROAD COMPANY,
(Defendant-Appellee) Petitioner,

—against—

JAMES J. E. BURKE,
(Plaintiff-Appellant) Respondent.

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## PETITION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

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The petition of the Union Pacific Railroad Company respectfully shows to this Honorable Court as follows:

### Facts of the Case.

Your petitioner is a common carrier, incorporated under the laws of the State of Utah, and

the respondent is a citizen and resident of the State of New York.

On or about March 10, 1915, at Yokohama, Japan, the firm of S. Outra and Brother, delivered to the Pacific Mail Steamship Company (hereinafter called the Steamship Company), for transportation, fifty-six (56) cases of drawn work goods and Renaissance, consigned to New York City, New York, to be there delivered to the shipper's order, and the Steamship Company delivered and the shipper accepted a bill of lading, one of the conditions of which provided that the carrier's liability for loss should be limited to One hundred ($100.00) dollars per package unless a different value was declared by the shipper. No different value was in fact declared by the shipper.

The freight was not prepaid, but the bill of lading showed as collect freight the sum of Five hundred and seven and 2/100 ($507.02) dollars, made up as follows:—Ocean fright at the rate of fifty cents (50c.) per hundred pounds, based on the weight of the shipment of 26,404 pounds, or a total of One hundred thirty-two and 2/100 ($132.02) dollars, ocean freight from Yokohama to San Francisco, and rail freight at the rate of One and 25/100 ($1.25) dollars per hundred pounds, based upon a mirimum carload weight of 30,000 pounds, or a total of Three hundred and seventy-five ($375.00) dollars, rail freight, from San Francisco to New York.

The Steamship Company duly transported the property to San Francisco, California, and there delivered it to the Southern Pacific Company, and the Southern Pacific Company thereupon transported the property to its point of junction with your petitioner's line and delivered it to your petitioner for carriage.

The entire shipment was totally destroyed at 7
or near Rawlins, Wyoming, while in the custody of your petitioner.

At the time the shipment was made, the so-called Carmack Amendment (34 Stat. L. 595) was in effect, but the Cummins Amendment (38 Stat. L. 1196) had not yet taken effect.

The invoice and market value of the goods amounted to $17,549.01.

Prior to the commencement of this action, the 8
respondent became the owner of all claims and rights of action arising out of the facts above set forth, through written assignments for value duly executed by S. Ontra and Brother to Douglas F. Cox, of West Orange, New Jersey, and by said Douglas F. Cox, to respondent.

## The Proceedings in the Appellate Division of the Supreme Court of New York. 9

On January 18, 1917, the case was submitted on an agreed statement of facts to the Appellate Division of the Supreme Court of the State of New York for the First Department. The Ap-

pellate Division held that the clause in the ocean bill of lading limiting the carrier's liability to $100.00 per package was valid, even though the
10 rate of freight charged was not based on such valuation; that since the ocean bill of lading was denominated a through bill of lading, and stated the liabilites of companies and carriers, the agreement was intended to apply to all successive carriers, but that the shipment during its transit over your petitioner's line was controlled by the Interstate Commerce Law, the filed classifications and tariffs and the provision of the uniform bill of lading. The Appellate Division further held that while the schedule of classifications filed
11 with the Interstate Commerce Commission did not specifically provide for such an agreement for limited liability, it did not forbid it; that the uniform bill of lading provided that loss or damage shall be computed:

1. On the basis of the invoice value of the property.
2. Unless a lower value was represented in writing by the shipper or
3. Agreed upon, or
4. Determined by the classification or
12 by the tariffs upon which the rate is based.

The court further held that the shipment in this case fell within the third class, in that a lower value had been agreed upon by the carrier and the shipper, and that therefore the valuation clause was valid.

In accordance with this opinion, the Appellate Division entered an order that the respondent have judgment against your petitioner for the sum of $5600.00, with interest from March 10, 1915, less your petitioner's taxable costs and disbursements and judgment was entered in the Supreme Court for New York County awarding to the respondent against your petitioners, the sum of $6,349.72. 13

## The Proceedings in the Court of Appeals. 14

An appeal from the decision of the Appellate Division was duly allowed and taken by the respondent to the Court of Appeals of the State of New York. The Court of Appeals by a divided court reversed the judgment, Judge Collin writing the majority opinion and Judge Hogan dissenting.

In its opinion the majority of the Court of Appeals held that the agreed valuation clause was a term of the bill of lading, which was not specifically contained in the filed tariffs; that while the permissibility of limiting the recovery to a valuation agreed upon has been conclusively established, the permissibility must be shown or declared by the established and filed classifications; that the charge made for inland transportation was not based on the valuation; that the shipper had been given no choice of rates, and that there was no relation between the agreed 15

16 valuation and the freight rate fixed; that there was therefore no basis for an estoppel as against the respondent, and that therefore the respondent was entitled to recover the invoice value of the goods.

Judgment was entered accordingly against your petitioner for the sum of $17,549.01, with interest from March 10, 1915, together with costs in said Court of Appeals and said Appellate Division. A remittitur was duly filed in the office of the Clerk of the Appellate Division of the Su-
17 preme Court for the First Department, and on the 28th day of July, 1919, the said judgment of the Court of Appeals was made the judgment of the said Appellate Division of the Supreme Court. The said order of the Appellate Division was duly filed in the office of the Clerk of the Supreme Court for New York County on the 5th day of August, 1919, and in accordance with said order judgment was entered in the Supreme Court of New York County, in favor of the plaintiff on the 14th day of August, 1919, for the sum of Twenty-two thousand five hundred and 54/100
18 ($22,500.54) dollars.

The questions argued before the Appellate Division and the Court of Appeals and decided by them, are as follows:

1: Under the Carmack Amendment (prior to the Cummins Amendment) is an agreed valuation in a through bill of lading rendered invalid

simply because the rate of freight for the rail portion of the transit is the same under the filed 19
tariffs regardless of the value of the goods.

2: Does the Carmack Amendment render invalid a valuation not based on a difference of rate?

3: Is the rule in *Reid* v. *Fargo* (241 U. S. 544) that a valuation in an ocean bill of lading is valid even though no higher rate would have been charged if the goods had been shipped at their actual valuation, applicable where the loss occurs on the inland portion of the shipment, or has the Carmack Amendment created a different 20
rule with respect to Interstate Commerce?

And your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons, among others:

1. Because an important question of interstate commerce is involved.

2. Because the questions of law herein have 21
not been passed upon by this Court.

3. Because there is a division of opinion between the Appellate Division of the Supreme Court of New York and the Court of Appeals of

New York on the question of the validity of an agreement fixing the value of a shipment originating outside of the United States and carried in interstate commerce in the United States.

4. Because the Court of Appeals of New York bases its decision on the ground that such an agreement to limit liability is not valid unless the rate of freight charged is based on the agreed value, thus establishing a rule as to interstate shipments at variance with the Federal rule as to foreign shipments as laid down in *Reid* v. *Fargo* (241 U. S. 544).

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of said Supreme Court in this case which was entitled in that Court: "James J. E. Burke, plaintiff, against the Union Pacific Railroad Company, defendant," to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your Petitioner may have such other and further relief in the premises, as to this Court may seem just, and that the said judgment of the

said Supreme Court may be modified by this Honorable Court.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
By OSCAR R. HOUSTON.

State of New York,
County of New York—ss.: 25

OSCAR R. HOUSTON, being duly sworn deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar, attorneys for the Union Pacific Railroad Company, petitioner herein; that he participated in the preparation of the foregoing petition, and knows the contents thereof, and that the allegations therein are true as he verily believes. 26

OSCAR R. HOUSTON.

Sworn to before me this
9th day of October, 1919.

CORNING G. MCKENNEE,
Notary Public, [NOTARIAL SEAL]
Queens County No. 1183.

Certificate filed in New York County, Clerk's No. 150; New York Co. Register's No. 1110.
Certificate filed in Kings County, Clerk's No. 17; Kings County Register's No. 146.
Term expires March 30, 1920.

We hereby certify that we have examined the foregoing petition and in our opinion it is well
27 founded and is entitled to the favorable consideration of this Honorable Court.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1919.

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UNION PACIFIC RAILROAD COMPANY,
(Defendant-Appellee) Petitioner,

—against—

JAMES J. E. BURKE,
(Plaintiff-Appellant) Respondent.

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## BRIEF FOR PETITIONERS.

This is a petition for a writ of certiorari to the Supreme Court of the State of New York, to bring up for review a case arising out of the loss of some goods on the petitioner's line of railroad while en route from Yokohama to New York. The petitioner's liability is admitted, and the only question is as to the amount of damages. The facts are fully set out in the agreed statement [Record, (fols. 4-15)] and in the petition.

## I.

**The precise question at issue is whether, in order that an agreed valuation of an interstate shipment shall be valid, before the passage of the so-called Cummins Amendment, the rate of freight charges must have been based upon the agreed valuation.**

The Appellate Division of the Supreme Court and the Court of Appeals agree:

(1) That the ocean bill of lading under which the goods were shipped was a through bill of lading;

(2) That the agreed valuation was intended to apply and did apply to all successive carriers;

(3) That the shipment during its carriage over the petitioner's line was subject to the Interstate Commerce Law, the filed classifications and tariffs and the provisions of the uniform bill of lading; and

(4) That nothing in the Interstate Commerce Act prior to the passage of the Cummins Act made such an agreement illegal.

The Appellate Division held that it was of no

moment that the inland freight charges did not appear to have been based on this valuation of $100 per package; and cited *Reid* v. *Fargo,* 213 Fed. 771; affirmed on this point 241 U. S. 544.

It is to be noted that there is no proof whether or not the *ocean* freight would have been different had a different value been placed on the goods.

The case of *Reid* v. *Fargo* involved an automobile shipped from England to the United States under a bill of lading which contained a clause fixing its value at $100. The shippers proved affirmatively that the carrier's rates on automobiles were based on measurement (that is, so much per 40 cubic feet), and that, if the full value of the automobile had been declared, the rate would have been the same. Although the bill of lading recited that where a higher value was declared "extra freight as may be agreed upon" was to be paid, it was proven affirmatively that no such extra freight rate actually existed and that no extra freight would have been asked by the Carrier.

In sustaining the valuation the Circuit Court of Appeals for the Second Circuit said:

> "Similar stipulations are held binding in this court. *George N. Pierce Co.* v. *Wells Fargo Co.,* 189 Fed. 561, 110 C. C. A. 645. But the proctors for the express company contend that, as the freight on the car was calculated on measurement and not on

> value, this stipulation does not apply. Freight rates on a package and the amount an owner may recover in case of loss are two entirely different things. The parties may agree that for a higher freight the package shall be valued for purposes of recovery at over $100. In this case they have agreed that the value of the car is $100 and that must be taken to be its true value for the purposes of the contract of carriage. Of course the stipulation would not apply if the car had been charged an *ad valorem* freight on a value over that amount. But in this case the freight was charged on measurement."

On certiorari the Supreme Court sustained the limitation without discussion (241 U. S. 544) although reversing the decree as to other parties.

In the present case, the Court of Appeals of New York, overruling the Appellate Division, held that the agreed valuation was not valid and effective because the charge made for the inland transportation was not based upon the agreed valuation. In support of this conclusion they cite numerous Federal and New York decisions, none of which, however, decide the point.

The cases cited by the New York Court of Appeals are the following:

The case of *Hart* v. *Penn R. Co.*, 112 U. S. 331 involved a shipment of live stock under a bill of lading containing an agreed valuation clause. There was no evidence one way or the other as to whether the rate of freight was based

on the valuation. The court assumed that the rate was so based, and held the agreed valuation clause valid. The case is not authority, however, for the decision that without a rate of freight based on the valuation the agreed valuation is invalid. At most, *Hart* v. *Penn R. Co.* rises no higher than dictum on this point.

*American Express Co.* v. *U. S. Horse Shoe Co.*, 244 U. S. 58, was a suit against the plaintiff in error for failure to deliver a colt delivered to it for transportation. The express receipt fixed a primary value of $50 each for colts. No other value was written in by the shipper and the rate charged was based on the $50 value. The court held the limitation of liability was valid, basing their decision on an estoppel against the shipper.

The case of *Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278 involved a shipment of automobiles by express from Buffalo to San Francisco, the express receipt stating that the value of the goods was limited to $50 unless a greater value was declared, which had not been done. It is true that two freight rates were offered the shipper in this case but the fact that the court held the stipulation valid is again not a decision that it would have been *invalid* if there had been but one rate.

The case of *Kansas City Southern Railroad Co.* v. *Carl*, 227 U. S. 639, involved a shipment of

household goods, in which the shipper signed an owner's released valuation clause limiting liability for loss or damage to $5 per hundred weight, in consideration of which he received a lower freight rate; and the clause was held valid.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, a case involving the shipment of a diamond ring by express, the receipt contained a stipulation limiting the valuation to $50 unless a greater value declared. The Court held the stipulation valid and used the following language.

> "It has therefore become an established rule of the common law as declared by this Court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

This rule is not, however, authority for the *converse* rule that if the agreed value is made for some other purpose it is *invalid*.

*Chicago, Rock Island & Pacific Ry. Co.* v. *Cramer*, 232 U. S. 490, is to the same effect. This case involved a shipment of a carload of hogs, whose value the shipper represented to be $10 per head, in order to secure a lower rate of freight. The court held the valuation binding.

*Western Transit Co.* v. *A. C. Leslie & Co., Ltd.*, 242 U. S. 38, held that the released valuation clause in an interstate bill of lading when based upon a difference in freight rates was valid.

*Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389, concerned a contract between shipper and carrier, where the valuation was limited to $5, per 100 pounds in consideration of a lower rate of freight and again the stipulation was held valid.

*D'Utassy* v. *Barrett*, 219 N. Y. 420, held that an agreed valuation by shipper and carrier concluded the shipper even where the loss was due to theft by the carrier's own servants.

*Moore* v. *Duncan*, 237 Fed. 780, was a case involving a shipment of pig iron, in which the shipper paid a freight rate based on a released valuation of $100 and the released valuation clause was held valid, the court again basing its decision on the basis of estoppel against the shipper.

The case of *Boston & Maine R. R. Co.* v. *Piper*, 246 U. S. 439, was a case which decided that a stipulation in a contract for the shipment of live stock, limiting the carrier's liability, in case of unusual delay and detention, to the amount actually spent by the shipper in the purchase of food and water for his stock, was invalid, be-

cause a stipulation exonerating the carrier from losses due to his own negligence.

*Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin*, 241 U. S. 319, involved a shipment of mules, in which the bill of lading stipulated that the value should not exceed $75 per animal and that for every increase in value of 100% or fraction thereof, the tariff should be increased 50%. The court held the stipulation valid, and at page 327 delivered itself of the following dictum, for which it cited no authority:

> "The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

The statement is only dictum, however, and in no case where a choice of rates has not been made to appear, has it been decided that the agreed valuation clause was invalid.

## II.

### The question at issue has not been decided by this court in any case involving interstate commerce.

The cases cited by the Court of Appeals, a summary of which is given above, do not sustain

the proposition in support of which they are cited. They are all cases in which the agreed valuation clause was held valid; but dicta from them are used to support a holding that an agreed valuation clause is invalid, unless a choice of rates has been offered the shipper.

Your petitioners contend that the conclusion of the Court of Appeals is based upon a logical fallacy which may be expressed syllogistically as follows:

*Major Premise:* In all cases where the freight rate is based on the valuation, the agreed valuation clause is held valid.

*Minor Premise:* In this case, the freight rate is not based on the valuation.

*Conclusion:* In this case, the agreed valuation clause is not valid.

The fallacy is obvious. To express the fallacy in terms of logic, the Major Term is distributed in the conclusion and undistributed in the premise, and so violates the rule that a term distributed in the conclusion must also be distributed in its premise.

## III.

### The rule at federal common law has been settled in favor of your petitioners.

The case of *Reid* v. *Fargo*, 241 U. S. 544, is an express adjudication that, by the law as administered in the Federal Courts, apart from statute, an agreed valuation is valid and binding, regardless of whether or not the freight rate is based on the valuation agreed upon. If therefore the present case is to be decided on the principles of the Common Law, as administered in the Federal Courts, *Reid* v. *Fargo* is decisive of the question, and the Court of Appeals of New York erred in holding the case inapplicable. (*Reid* v. *Fargo* was an admiralty case, but on this point no distinction between admiralty and common law has ever been suggested.)

## IV.

### Interstate commerce is governed by the federal common law and the Interstate Commerce Act.

The effect of the Carmack Amendment to the Interstate Commerce Act was to withdraw interstate commerce from the diverse operation of state laws, and subject it to a uniform Federal rule.

In the case of *New York Central R. R.* v. *Beaham*, 242 U. S. 148, the Court said at page 151:

> "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and *common law principles* accepted and enforced in federal courts."

And in *Southern Express Company* v. *Byers*, 240 U. S. 612, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and *common law principles* accepted and enforced by the federal courts."

## V.

## If the Carmack Amendment has laid down a different rule for interstate commerce, the question should be decided by this court.

If the common law rule as enunciated in *Reid* v. *Fargo* does not apply to this shipment, then the Carmack amendment must have changed the rule for interstate commerce. If so, your petitioners contend that the question is a proper and an important one for review by this Court.

Neither the New York Court of Appeals nor the Appellate Division have suggested that the Carmack Amendment has changed the rule, and we do not mean to intimate that it affects the decision of this case.

## *VI.*

### *The Supreme Court of New York is the proper court to which the writ should be addressed.*

The reviewing courts in New York State do not retain the judgment after record, but remit it to the Court below. On this account a writ from this Court is properly addressed to the Supreme Court of New York, in whose custody the record of the case now is.

*Gelston* v. *Hoyt,* 3 Wheaton, 246 at 249 and 335;
*Atherton* v. *Fowler,* 91 U. S. 143 at 146 and 148;
*McGuire* v. *Commonwealth,* 3 Wall, 382 at 386.

Respectfully submitted,

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Petitioner.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Of Counsel.

*Sirs:*

Take notice that we shall submit the foregoing petition for a writ of certiorari and brief in support thereof to the Supreme Court of the United States at the opening of the Court on Monday, November 10th, 1919.

Dated, New York City, October 23, 1919.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Petitioner.

To TIPPLE & PLITT, Esqs.,
Attorneys for Respondent.